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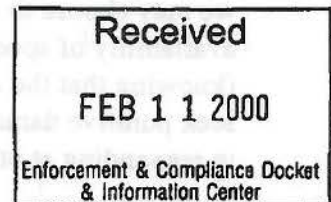
OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Placement of Proceeds from CERCLA Settlements in Special Accounts

FROM: Sandra L. Connors, Director *Sandra L. Connors*  
Regional Support Division  
Office of Site Remediation Enforcement

TO: CERCLA Regional Counsel Branch Chiefs, Regions I-X  
Regional CERCLA Program Branch Chiefs, Regions I-X  
Regional Finance Office Branch Chiefs, Regions I-X



This memorandum advises regional offices of opportunities to place proceeds received from CERCLA settlements into an EPA special account.<sup>1</sup>

**Background**

Prior to 1986, when the Agency received proceeds from a CERCLA settlement (e.g., consent decree, order on consent, or other form of agreement), all such funds were deposited in the EPA Hazardous Substance Superfund (Trust Fund). When CERCLA was amended in 1986, Section 122(b)(3) was added, which provides that the Agency may retain and use amounts received from an agreement to carry out any actions contemplated by that agreement. This is the authority that provides EPA the flexibility to place settlement proceeds in a site-specific account, typically referred to as a "special account." EPA manages special account funds in a sub-account within the Trust Fund. Special account funds may be used without further appropriation by the Congress.

In October 1995, EPA announced the Superfund Reform on Special Accounts, to encourage greater use of special accounts and to ensure that interest earned on special accounts be credited to such accounts. Agency guidance suggested that for payments received, the past cost component of a settlement should be deposited into the Trust Fund, and only the future cost component (plus premium) should be placed in a special account. However, the statute's 'retain

<sup>1</sup> This memorandum supersedes the "Update and Implementation of the Superfund Reform on Special Accounts (February 1997)," as it relates to the designation of past and future costs received in settlement.

and use" authority does not distinguish between past and future costs. This means that the entire payment, even if it consists only of payments for past costs, may be placed in a special account at the Agency's discretion.

#### Placement of Proceeds into a Special Account

There are several advantages to placing settlement proceeds in a special account that will be used to conduct or finance response actions at a site. When funds are available in a special account, a region can directly access the funds to address selected response actions, emergency situations or unknown contingencies relating to the site. Other advantages include: the availability of special account funds as a settlement incentive for PRPs to perform the remedy (as we may choose to disburse a portion of the special account to the performing PRP)<sup>2</sup>; the availability of special account funds as an incentive for PRPs to perform after EPA issues a UAO (knowing that the Agency has funds available to perform the response action and may thereafter seek punitive damages if they do not comply); and the conservation of Trust Fund dollars for use in responding at other sites where there are no viable PRPs.

Based on these advantages, regions should evaluate every settlement that involves a payment for past and/or future response costs for appropriate opportunities to place the proceeds into a special account. An early de minimis settlement is a good example of where all proceeds received ordinarily should be placed in a special account. Proceeds from cost recovery settlements should also be placed in a special account where there is no PRP performing the response action or where there are remaining site risks. Where a region places proceeds into a special account, the following language should be used to address the potential uses of the proceeds.<sup>3</sup>

"Amounts paid by Settling Defendant [or other applicable name] under this Consent Decree [or other document] and deposited into the [insert name] Special Account shall be retained and used to conduct or finance response actions at or in connection with the Site, or transferred by EPA to the EPA Hazardous Substance Superfund."

When a region receives payments for past costs and future costs and deposits the proceeds in a special account, it is not necessary to separately identify in the settlement document the different components of the payment. However, for financial management and tracking purposes, regions should identify the amount received in payment for past costs and the amount received in payment for future costs in the accompanying supporting documents (e.g., 10-point settlement analysis). When payments for past costs will be deposited in the Trust Fund and

<sup>2</sup> See "Interim Final Guidance on Disbursement of Funds from EPA Special Accounts to CERCLA Potentially Responsible Parties (November 3, 1998)."

<sup>3</sup> All existing models will be revised with appropriate special account language in the next few months.

payments for future costs are deposited in a special account, the settlement document should clearly delineate the different destinations for the payments.

There may be situations where it is inappropriate to place any of the settlement proceeds in a special account. For example, where a settlement occurs at a site where the region believes there are no remaining site risks that are likely to require additional response or projected future costs, the settlement proceeds should be deposited directly into the Trust Fund. Similarly, funds should not be placed in a special account where the proceeds are so small that the costs of establishing and managing a special account may outweigh any benefits to be realized. In addition, where a region will be receiving payments for past costs from work parties as part of an RD/RA agreement, the region should normally place those proceeds in the Trust Fund unless there are other additional response actions not addressed by the settlement (e.g., future operable units) or the payment (or a portion thereof) is to address the Agency's future oversight costs.

#### Headquarters Role

There are several staff members that can assist you with your questions on establishment and use of special accounts. These same staff should be contacted when a region is seeking prior written approval from OECA before offering to disburse special account proceeds to a PRP. OSRE Headquarters contacts for case-specific special account issues, by region, are:

Gary Worthman, (Regions 5, 7 and 10)(202-564-4296).  
Tracy Gipson (Regions 1 and 2)(202-564-4236)  
Lisa Blum (Regions 6 and 9)(202-564-4283)  
Meredith McLean (Regions 3, 4 and 8)(202-564-4216)

cc: Bill Cooke, Financial Management Division  
Steve Luftig, Office of Emergency and Remedial Response  
Earl Salo, Office of General Counsel  
Steve Pressman, Office of General Counsel  
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Tom Mariani, Department of Justice

